RECENT CASES

Assumpsit—Money Had and Received—Right of Creditor Under a Contract to Funds Fraudulently Paid to a Third Person—The International Railway Company was indebted to the plaintiff under a contract of employment. With full knowledge of this, the defendant fraudulently conspired with the company so that the latter paid to the defendant the money due to the plaintiff. On appeal from judgment sustaining a demurrer, *held*, for the plaintiff. *Caskie v. Philadelphia Rapid Transit Company*, 321 Pa. 157, 184 Atl. 17 (1936).

As the court indicated,[1] the plaintiff was entitled to recover from the defendant on at least three grounds. First, the majority of courts agree that parties to a contract have a property right therein, and if a third person intentionally and without justification interferes with such right, he has committed a tort for which he is liable in an action for damages.[2] In the instant case, although the defendant's receipt of payment in the guise of creditor under the contract did not preclude the plaintiff from recovering compensation from the debtor, it did tend to make such recovery more difficult, and was done both intentionally and unjustifiably.[3] Here, however, the plaintiff, choosing to waive the tort, sued in assumpsit for money had and received basing his action on the doctrine of unjust enrichment. The majority of courts, which allow recovery under this theory, reason that the one who received the money is not entitled thereto, that he must therefore pay it to someone, and that since the plaintiff is entitled to that sum of money because of a claim under which the defendant received it, the plaintiff should recover it from the party unjustly enriched.[4] But a group of cases have refused to allow recovery for money had and received unless "privity" exists between the parties to the suit in the form either of a promise that may be implied from the facts or of an express promise,[5] and they hold no implied promise can exist where the defendant received money in denial of the right of the plaintiff thereto.[6] Third, recovery may be supported by constructing a trust, since the defendant has "ex malificio" come into the possession of property to which the plaintiff had a right.[7] However, as tracing the res may often be impossible in

1. Instant case at 160.

2. Cumberland Glass Mfg. Co. v. DeWitt, 120 Md. 381, 87 Atl. 927 (1913), *aff'd*, 237 U. S. 447 (1915); Lamb v. S. Cheney & Son, 227 N. Y. 418, 125 N. E. 817 (1920); Hornstein v. Podwitz, 254 N. Y. 443, 173 N. E. 676 (1930); see HARPER, TORTS (1933) c. 13.

3. The plaintiff's right against the debtor still existed, but the debtor would obviously defend against payment on the ground that proper payment had already been made.

4. Heywood v. Northern Assur. Co., 133 Minn. 360, 158 N. W. 632 (1916); RESTATEMENT, RESTITUTION AND UNJUST ENRICHMENT (Proposed Final Draft 1936) § 126; (Tent. Draft No. 1, 1935) Explanatory Notes § 10 (1).

5. Sergeant & Harris v. Stryker, 16 N. J. L. 464 (1838); Richmond v. Read, 33 R. I. 527, 82 Atl. 387 (1912).

6. In KEENER, QUASI CONTRACTS (1893) 167, it is stated that there can be no recovery either in tort or in assumpsit; not in tort, because the defendant committed no tort against the plaintiff, who could still recover from the debtor, and not in assumpsit for money had and received, because the defendant did not represent himself as the agent of the plaintiff but represented himself as adverse to the plaintiff. If the defendant had represented himself as agent, the plaintiff could ratify the acts of the defendant but otherwise this is impossible. However, this reasoning has largely become outmoded and, furthermore, all courts allow restitution if the defendant, mala fides, has received the specific money of the plaintiff. Bates Farley Sav. Bank v. Dismukes, 107 Ga. 212, 33 S. E. 175 (1899); Story v. Robertson, 5 Neb. 405 (1904).

7. Angle v. Chicago, St. P., M. & O. Ry., 151 U. S. 1 (1893); 3 POMEROY, EQUITY JURISPRUDENCE (4th ed. 1918) 1053; RESTATEMENT, RESTITUTION AND UNJUST ENRICHMENT (Tent. Draft No. 1, 1935) Explanatory Notes 260.

these cases, this theory may afford considerable difficulty at times. But whatever legal justification is stated for recovery, the plaintiff is clearly entitled to a sum of money equal to that which the defendant holds and to which the defendant is not entitled. As the plaintiff has a right against the debtor and the latter may have one against the defendant and both claims are based on a substantially connected set of facts, there is every reason to avoid circuity of action and allow recovery by the plaintiff against the defendant. And even if the debtor has no right against the defendant because of the former's own participation in the conspiracy, nevertheless, the defendant is guilty of wrongful conduct, and is subjected to no undue hardship by being compelled to compensate the plaintiff, whose claim he asserted to receive payment from the company.

Bonds—Gold Clause—Right of Holder of Obligation of Foreign Government Payable in Gold Coin—Choice of Law Governing Obligation of Sovereign Contracted in Another State—The British government issued in America bonds stated to be payable "at the option of the holder, either in . . . New York . . . in gold coin of the United States of America of the standard of weight and fineness existing February, 1917, or in . . . London, . . . in sterling money at a . . . fixed rate of 4.86½ dollars to the pound." The Joint Resolution of Congress of June 5, 1933 provided that all obligations payable in money of the United States "shall be discharged upon payment, dollar for dollar, in . . . legal tender." [1] In a proceeding by bondholders for a declaration of their rights, *held,* that if the first option were exercised, the obligation of the British government, determined by British rather than American law, was to pay in New York in legal tender of the United States an amount equivalent to the face value of the bonds measured in gold of the standard of weight and fineness stated therein. *International Trustee for the Protection of Bondholders Aktiengesellschaft v. The King,* C. A. Eng., N. Y. L. J., Nov. 25, 1936, p. 1849, col. 3.

In holding that the law to apply in interpreting the contract was the law of England, and that under the second option the bondholder was not to be compensated for devaluation of the American dollar, the court upheld the decision of the King's Bench Division,[2] discussed in a previous issue of this REVIEW.[3] But rather than follow the lower court's interpretation of the gold clause as a contract for the payment of gold as a commodity, the court held that the intention of the parties was to use gold merely as a standard of value, an interpretation in accord with prevailing authority.[4] While saying it would not enforce a contract whose performance was forbidden by the law of the place of performance,[5] the court reasoned that there was nothing contrary to the law or public policy of the United States in a debtor's paying in legal tender more than the creditor was entitled to demand. Of greater significance is the fact that this case contains the first actual holding by an English court that where a sovereign government

1. 48 STAT. 112 (1933), 31 U. S. C. A. § 463 (Supp. 1934).

2. International Trustee for Protection of Bondholders Aktiengesellschaft v. The King, 52 T. L. R. 82 (K. B. 1935).

3. (1936) 84 U. OF PA. L. REV. 543.

4. Norman v. Baltimore & Ohio R. R., 294 U. S. 240 (1935), 83 U. OF PA. L. REV. 682; Feist v. Société Intercommunale Belge D'Électricité, [1934] A. C. 161, (1934) 82 U. OF PA. L. REV. 533; Serbian and Brazilian Loan Cases, Publications of the Perm. Ct. of Int. Just., Series A, Nos. 20/21 (1929), 11 BRIT. Y. B. INT. LAW 203 (1930); Dickinson, *The Gold Decisions* (1935) 83 U. OF PA. L. REV. 715. But see Pennock, *The Private Bond Case* (1936) 84 U. OF PA. L. REV. 194, 208.

5. Instant case at 1850, col. 2; Ralli Bros. v. Compania Naviera Sota y Aznar, [1920] 2 K. B. D. 287; RESTATEMENT, CONFLICT OF LAWS (1934) § 360.

enters into a loan contract in a foreign country, the contract is to be governed by the law of the borrowing government and not by the lex loci contractus,[6] on the theory that as the sovereign cannot be sued without its consent, it may be inferred that such consent when given is conditioned upon the case being governed by its own law. Granting that a sovereign can impose such conditions as it may choose upon its waiver of immunity from suit, when no such condition is expressly imposed there would seem to be no reason for supposing that any but the customary rule of interpretation is to prevail.

Constitutional Law—Abolition of Actions for Breach of Contract to Marry and for Seduction—The New York legislature passed a statute abolishing actions for breach of promise to marry and for seduction.[1] Plaintiff subsequently sued, alleging these two causes of action. *Held,* for defendant, on the ground that the statute was constitutional, as the legislature has plenary power to regulate marriage and marriage contracts, and because there was no common law right to recover for seduction. *Fearon v. Treanor,* N. Y. Ct. App., N. Y. L. J., Jan. 13, 1937, p. 185, col. 1.

For a complete discussion of this case, see the November issue of the REVIEW,[2] which approved the same result in the appellate division.[3]

Constitutional Law—Power of Courts to Review Impeachment Proceedings—A federal district judge filed a claim for salary on the ground that since the article of impeachment on which he had been judged guilty was merely an accumulation and combination of all the charges in the preceding articles on which he had been found not guilty, the Senate had no "jurisdiction" to try him on that article. *Held,* that the Court of Claims could not review the action of the Senate. *Ritter v. United States,* Ct. Cl., (1936) 4 U. S. L. WEEK 414.

While various state courts have recognized that a decision by the legislature in the trial of an impeachment is final under constitutional provisions similar to the one involved here,[1] a dictum in one case indicated that the jurisdiction of the legislature might be reviewed.[2] And so, in the instant case, the plaintiff contended that the Senate had no jurisdiction to try him upon the article on which he was convicted, an argument which obviously ignored the distinction between jurisdiction and the proper exercise of jurisdiction,[3] since what he actually complained of was misuse by the Senate of jurisdiction which it unquestionably had. That the courts will not interfere with the removal power vested in the

6. This proposition has, however, been stated as a dictum in several decisions of British courts and of the Permanent Court of International Justice. Smith v. Weguelin, L. R. 8 Eq. 196, 213 (1869); Goodwin v. Robarts, 1 App. Cas. 476, 495 (1876); Serbian Loans Case, Publications of the Perm. Ct. of Int. Just., Series A, Nos. 20/21 (1929), 11 BRIT. Y. B. INT. LAW 203 (1930). See also 2 BEALE, THE CONFLICT OF LAWS (1935) 1102.

1. N. Y. CIV. PRACT. ACT (Cahill, Supp. 1936) §§ 61a-61i.
2. (1936) 85 U. OF PA. L. REV. 110.
3. 288 N. Y. Supp. 368 (App. Div., 1st Dep't 1936).

1. State v. Chambers, 96 Okla. 78, 220 Pac. 890 (1923); Ferguson v. Wilcox, 119 Tex. 280, 28 S. W. (2d) 526 (1930); see Opinion of the Justices, 14 Fla. 289, 304 (1872); State v. Langer, 65 N. D. 68, 79, 256 N. W. 377, 381 (1934).
2. Ferguson v. Maddox, 114 Tex. 85, 89, 263 S. W. 888, 893 (1924).
3. "The jurisdiction of a court depends upon its right to decide a case and never upon the merits of its decision." "It is the power to hear and determine causes of the class to which the particular controversy belongs." Brougham v. Oceanic Steam Nav. Co., 205 Fed. 857, 859, 860 (C. C. A. 2d, 1913).

legislatures by way of impeachment is further evidenced by their denial of their jurisdiction to enjoin impeachment proceedings,[4] and by their refusal to allow the legislature to provide other means of removal when impeachment is specified by the constitution.[5] Nor are other reasons lacking for holding that the jurisdiction of the Senate in respect to impeachment is exclusive. As the instant case points out, the Constitutional Convention rejected various schemes for joining the courts in the exercise of this power.[6] Mr. Justice Story in discussing impeachment entertained no doubt that the decision of the Senate was to be final,[7] and believed that the intervention of the courts was to be especially avoided in cases of the impeachment of a judge.[8] Furthermore, the recognition by the Court of Claims of the political rather than the legal nature of impeachment is well supported by authority. Thus the fact that it is a matter of discretion rather than of strict rule was illustrated when, in the impeachment of Pickering, a United States district judge, a conviction was had for offenses not indictable either by common law or by statute,[9] and Mr. Justice Story contended that the Supreme Court should not try impeachments, because the nature of the offenses was such that they "are easily understood by statesmen, and are rarely known to judges." [10] Furthermore, as the question of judicial review of the inpeachment of a federal judge has arisen here for the first time, and as there have been few removals since the adoption of the Constitution, there seems to be little ground for the fear that to deny the courts this power would promote undue legislative interference with the judiciary.

Insurance—Surrender Charge for Policy Automatically Continued Upon Default—Surrender Charge of "Not More than One and One-half Per Cent" as Discrimination Between Policyholders of Same Class—The insured defaulted in payment of premiums, but made no physical surrender, so that his life insurance was automatically continued, as provided in the policy. In determining the cash surrender value available for extended insurance, the insurer made the maximum deduction under a policy provision allowing a surrender charge of "not more than one and one-half per cent of the face of the policy",[1] thereby reducing the surrender value to an amount insufficient to keep the policy in force to time of insured's death. If the deduction had not been made it would have been in force at that time. *Held,* that the beneficiary was entitled to the face of the policy, the provision for deduction of a surrender charge not being enforceable, as there had been no physical surrender, and secondly, because the policy provision permitted the insurer to discriminate between policyholders of the same class, which was prohibited by statute.[2] *New York Life Ins. Co. v. Boling,* 169 So. 882 (Miss. 1936).

4. Walton v. House of Representatives of Oklahoma, 265 U. S. 487 (1924).

5. Falloon v. Clark, 61 Kan. 121, 58 Pac. 990 (1899), cited with approval in State Bar of California v. Superior Court, 207 Cal. 323, 337, 278 Pac. 432, 438 (1929).

6. See FOSTER, CONSTITUTION OF THE UNITED STATES (1895) § 88; 1 STORY, CONSTITUTION (5th ed. 1891) §§ 757-759.

7. 1 STORY, CONSTITUTION § 750.

8. *Id.* at § 768.

9. FOSTER, *op. cit. supra* note 6, at 586, 587.

10. 1 STORY, CONSTITUTION § 764. See also the view expressed in People v. Hayes, 82 Misc. 165, 169, 143 N. Y. Supp. 325, 328 (1913).

1. See instant case at 882.

2. MISS. CODE (1930) § 5171. "No life insurance company . . . shall make any distinction or discrimination in favor of individuals of the same class and equal expectations of life in the amount of payments of premiums or rates . . . as in the dividends or other benefits payable thereon, or in any of the terms and conditions of the contract. . . ."

In holding that the surrender charge was not deductible because there had been no physical surrender, the court followed its earlier decision of *New York Life Ins. Co. v. Blaylock*.[3] There, in construing the provision for surrender charge, the court in effect said that such a charge was properly incident only to an affirmative, physical surrender of a policy, as where the policy was surrendered for cash or where insured elected to take extended insurance. But where there was only a lapse, as distinguished from a physical surrender, and the insurance was automatically extended in case of failure to act affirmatively, then since there was no physical surrender there could be no service charge for surrender and consequently the extended term of insurance would be longer. It would seem that this rule is based on a misconception of the purposes of such a charge,[4] which, in the main, are: (1) to repay acquisition expenses if the policy has not become self-sustaining, (2) to pay the costs incident to the physical surrender and cancellation of the policy and the issuance of a new policy, and (3) to provide a penalty to discourage a policyholder from withdrawing from the company.[5] Since these conditions exist whether or not there is a physical surrender, it would seem that the court should properly have rejected the *Blaylock* case, which is in opposition to the overwhelming majority.[6]

However, the court held as a second ground, that regardless of the manner of surrender, the surrender charge could not be deducted because it permitted the insurer to discriminate between policyholders of the same class, the insurer being able to charge any amount within the maximum of one and one-half per cent. Here the court acted, without precedent, to add another to the methods of effecting a discrimination forbidden under many statutes hitherto construed as applying to rates, premiums, benefits, etc. between individuals or risks of the same class.[7] But it would be difficult to conceive of any method of imposing a service charge for surrender which would not be discriminatory in some manner. If it were a fixed sum, regardless of the amount of the policy, the holder of the small policy might argue that he pays too much, because the cost of liquidating assets for the payment of a large cash value are greater than those for liquidating a small portion of assets for the smaller policy. And if a "fixed per cent of the face value of the policy" [8] were deducted, as the writer of the majority opinion infers would be proper, a policyholder would be justified in contending that the costs of surrender do not vary proportionately with the size of the policy. And it would seem that to apply the exact costs of surrender to each policy would be impractical and might raise the general level of costs, yet only by this method would the objection of discrimination be completely obviated, and the purpose of placing upon all persons equitable burdens be accomplished. It is submitted

3. 144 Miss. 541, 110 So. 432 (1926).

4. See Carter v. Mutual Benefit Life Ins. Co., 230 Ala. 389, 391, 161 So. 446, 447 (1935) in which the court made substantially the same objection to the Blaylock decision.

5. See instant case at 882.

6. Inter-Southern Life Ins. Co. v. Zerrell, 58 F. (2d) 135 (C. C. A. 8th, 1932); Carter v. Mutual Benefit Life Ins. Co., 230 Ala. 389, 161 So. 446 (1935); Bene v. New York Life Ins. Co., 191 Ark. 714, 87 S. W. (2d) 979 (1935); Erickson v. Equitable Life Assur. Society, 193 Minn. 269, 258 N. W. 736 (1935).

7. For a general discussion of discriminations, the method of effecting them, and the prohibitory statutes, see 3 COUCH, INSURANCE (1929) §§ 584, 585. Some of the usual discriminatory devices include charging excessive premiums, giving rebates, agreement to accept services or advice as a credit on premiums otherwise payable in money, agreement by an agent to obtain a loan from his company and not charge a commission therefor, if borrower takes life insurance through him, and agreement between insurance agent and insured whereby premium notes are to be carried indefinitely.

8. See instant case at 884.

that a practical method, designed to effect the least discrimination, would be to compel insurers to work out, in the manner of other insurance calculations, the expected surrender charges on the various types of policies, rather than to determine arbitrarily, without agreement with the insured, the amount of such charges.

Public Officers—Power of City Council to Remove a Member for Offenses Committed in Prior Office—A member of the city council was charged with various offenses, including violations of state and federal laws and misfeasance and malfeasance in office, alleged to have been committed during his term as a city commissioner under a previous form of government and prior to his election to council. After a hearing, the city council passed a resolution finding the prosecutor guilty of the charges and expelling him from office, relying upon a section of the city charter providing, "that the common council . . . may punish or expel a member for disorderly conduct, or violation of its rules . . . ".[1] *Held,* on certiorari, that such expulsion may be for misconduct only while in the office he now holds, so that the council was without power to expel him for previous offenses. *Walsh v. City Council of the City of Trenton,* 117 N. J. L. 64 (1936).

There is a split of authority as to whether an officer who is his own successor by re-election can be removed from office because of his misconduct during the preceding term. The better view would seem to be that such misconduct is sufficient cause for removal.[2] The jurisdictions which have adopted the opposite rule have advanced, as their bases, the principle that the statute was penal in character and, therefore, should be strictly construed,[3] or the doctrine of condonation.[4] To stress the penal nature of the statute is to defeat what seems to be an important, if not its primary purpose—the removal from office of a corrupt or unfit official to prevent future delinquencies.[5] To adopt the theory of condonation is to subscribe to the unrealistic fiction that the public has knowledge of the offenses the wrongdoer has committed and has forgiven them. However, the court in the instant case refused to consider the prosecutor as having succeeded himself in office when he was elected as a councilman, and therefore held that the cases on succession in office were inapplicable,[6] as have other decisions in similar situations, saying in each case, that the statute was incapable of any construction to the contrary.[7] That such a result may often be undesirable is force-

1. N. J. Laws 1874, c. CCC, § 20.

2. Bolton v. Tully, 114 Conn. 290, 158 Atl. 805 (1932); State v. Welsh, 109 Iowa 19, 79 N. W. 369 (1899); Allen v. Tufts, 239 Mass. 458, 131 N. E. 573 (1921); Hawkins v. Grand Rapids, 192 Mich. 276, 158 N. W. 953 (1916); Newman v. Strobel, 236 App. Div. 371, 259 N. Y. Supp 402 (4th Dep't 1932). *Contra:* State *ex rel.* Brickell v. Hasty, 184 Ala. 121, 63 So. 559 (1913); Jacobs v. Parham, 175 Ark. 86, 298 S. W. 483 (1927); Thurston v. Clark, 107 Cal. 285, 40 Pac. 435 (1895); see State *ex rel.* Tyrell v. Jersey City, 25 N. J. L. 536, 543 (1856).

3. State *ex rel.* Brickell v. Hasty, 184 Ala. 121, 63 So. 559 (1913); Jacobs v. Parham, 175 Ark. 86, 298 S. W. 483 (1927).

4. Thurston v. Clark, 107 Cal. 285, 40 Pac. 435 (1895); State *ex rel.* Tyrell v. Jersey City, 25 N. J. L. 536 (1856).

5. In State v. Welsh, 128 Iowa 19, 21, 79 N. W. 369, 370 (1899), the court said: "The very object of the removal is to rid the community of a corrupt, incapable, or unworthy official. His acts during his previous term quite as effectually stamp him as such as those of that he may be serving."

6. Instant case at 70.

7. Speed v. Detroit, 98 Mich. 360, 57 N. W. 406 (1894); State *ex rel.* Schulz v. Patton, 131 Mo. App. 638, 110 S. W. 636 (1908); People *ex rel.* Bancroft v. Weygant, 14 Hun 546 (N. Y. 1878).

fully illustrated by the instant case, which emphasizes the necessity for legislation to provide more clearly for this type of situation.[8] But even without such an amendment, it would not seem unreasonable to regard the term on the commission as substantially the same as a prior term in council, in view of the similar functions and jurisdiction of the two bodies. Removal would then have been supported by a well reasoned line of precedents.[9]

Taxation—Ad Valorem State Tax on Resident's Intangible Property Having Business Situs Outside the State—Defendant appealed from an assessment by Kentucky of an ad valorem tax on his interest in partnership securities which were utilized in investment transactions in New York. *Held,* that since the securities had acquired a "business situs" in New York, Kentucky had no power to tax them. *Commonwealth v. Madden's Ex'r,* 97 S. W. (2d) 561 (Ky. 1936).

Although it is well settled that intangible personalty is taxable at the domicile of the creditor,[1] under the doctrine of *mobilia sequuntur personam,* it is also recognized that such property may, by being employed in another jurisdiction, acquire a "business situs" so as to render it taxable there.[2] Whether, in the latter case, the domicile of the creditor may also impose a tax on the credits is not altogether clear.[3] Although there is some authority to the contrary,[4] many state courts [5] and the United States Supreme Court [6] have upheld the power of the domiciliary state to tax intangibles even though they have acquired a "business situs" elsewhere. But these cases arose before the recent decisions revealing the Supreme Court's hostility to multiple taxation. Having already held that tangible personalty may be taxed directly or indirectly by only one state,[7] the Court extended its restriction against multiple taxation by holding that intangibles in the absence of their having acquired a "business situs" may be taxed only by the state of the creditor's domicile.[8] Thus, it is not unlikely that the Court,

8. See Speed v. Detroit, 98 Mich. 360, 371, 57 N. W. 406, 410 (1894).
9. See cases cited *supra* note 2.

1. Blodgett v. Silberman, 277 U. S. 1 (1928); Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930); see Rottschaefer, *State Jurisdiction to Impose Taxes* (1933) 42 YALE L. J. 305.

2. New Orleans v. Stempel, 175 U. S. 309 (1899); Metropolitan Life Ins. Co. of New York v. New Orleans, 205 U. S. 395 (1907); Wheeling Steel Corp. v. Fox, 298 U. S. 193 (1936), 85 U. OF PA. L. REV. 122.

3. See Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 213 (1930); First National Bank of Boston v. Maine, 284 U. S. 312, 331 (1932).

4. Miami Coal Co. v. Fox, 203 Ind. 99, 176 N. E. 11 (1932); Buck v. Board of County Comm'rs, 103 Kan. 270, 173 Pac. 344 (1918).

5. State v. Pittsburgh Plate Glass Co., 147 Minn. 339, 180 N. W. 108 (1920); 2 COOLEY, TAXATION (4th ed. 1924) § 464; Brown, *Multiple Taxation by the States—What is Left of It?* (1935) 48 HARV. L. REV. 407, 425.

6. Cream of Wheat Co. v. County of Grand Forks, 253 U. S. 325 (1920); see also Liverpool & London & Globe Ins. Co. v. Board of Assessors, 221 U. S. 346 (1911); Fidelity & Columbia Trust Co. v. Louisville, 245 U. S. 54 (1917); Brown, *supra* note 5, at 426.

7. Union Refrigeration Transit Co. v. Kentucky, 199 U. S. 194 (1905); Frick v. Pennsylvania, 268 U. S. 473 (1925); *cf.* New York Central R. R. v. Miller, 202 U. S. 584 (1906); Southern Pacific Co. v. Kentucky, 222 U. S. 63 (1911).

8. Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204 (1930); Baldwin v. Missouri, 281 U. S. 586 (1930); Beidler v. South Carolina Tax Comm., 282 U. S. 1 (1930); First National Bank of Boston v. Maine, 284 U. S. 312 (1932); *cf.* Safe Deposit & Trust Co. of Baltimore v. Virginia, 280 U. S. 83 (1929); Baltimore v. Gibbs, 166 Md. 364, 171 Atl. 37 (1934); Rottschaefer, *The Power of the States to Tax Intangibles* (1931) 15 MINN. L. REV. 741.

despite its earlier decisions to the contrary,[9] will refuse, as did this decision, to allow the domiciliary state to tax intangibles when they have acquired a "business situs" elsewhere. This viewpoint is strengthened by the strong sentiment against double taxation which the Court has manifested,[10] and by its statement that "the rule of immunity from taxation by more than one state . . . is broader than the applications thus far made of it." [11]

Taxation—Constitutional Law—Inheritance Tax Classification Based on Time of Creation of Power Violative of Equal Protection Clause—The appellants, children of the intestate, inherited certain property that the latter had owned absolutely. The intestate was also the donee of powers of appointment in three trusts created in 1862, 1877 and 1891 respectively. The first was an inter vivos trust, wherein the intestate had a general power of appointment, in default of which the property would go to her children. The second was created inter vivos by the intestate and the appellants were given contingent remainders.[1] The third was testamentary, the intestate having a power of appointment, in default of which the property would go to her children. In 1907 a tax was imposed on property passing to lineal descendants.[2] This tax was prospective in nature and made no mention of powers of appointment. In 1909 a statute provided that the exercise of, or non-exercise of, a power of appointment derived from the disposition of property prior to 1907 would be deemed a disposition of such property belonging to such donee, and would be taxable at his death as if it had belonged to that person absolutely.[3] Such a power given after 1907 would not be taxed as part of the donee's estate.[4] Inter vivos transactions such as that of 1862 would not have been taxed in any manner if made after 1907.[5] The property owned absolutely and that passing under the power were aggregated

9. *Supra* note 6. Cases involving double taxation of intangibles still exist, *e. g.*, the United States Supreme Court has allowed a seat on the stock exchange to be taxed both at the domicile of the owner [Citizens National Bank v. Durr, 257 U. S. 99 (1921)] and by the state where the exchange is located [Rogers v. Hennepin County, 240 U. S. 184 (1916); *cf.* People *ex rel.* Whitney v. Graves, U. S. Sup. Ct., (1936) 4 U. S. L. Week 514]; likewise shares of stock are taxable at the domicile of the owner [First National Bank of Boston v. Maine, 284 U. S. 312 (1932)] and at the domicile of the corporation [Corry v. Baltimore, 196 U. S. 466 (1905)]. But the recent decisions of the Supreme Court have rendered these cases questionable. See Brown, *supra* note 5, at 419. See also Lowndes, *The Passing of Situs—Jurisdiction to Tax Shares of Corporate Stock* (1932) 45 HARV. L. REV. 777, 779.

10. See Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 212 (1930); First National Bank of Boston v. Maine, 284 U. S. 312, 326, 334 (1932).

11. First National Bank of Boston v. Maine, 284 U. S. 312, 326 (1932).

It appears that the tax, in the instant case, was on the defendant's interest in the partnership assets. If the tax had been imposed on his interest in the partnership, it would seem that a different result might be permitted by Blodgett v. Silberman, 277 U. S. 1 (1928). In that case the Court held that the interest of a Connecticut resident in a New York partnership, like the one here, was intangible personalty subject to the Connecticut transfer tax, on the ground that the resident's interest in the partnership, under New York law, was something distinct from his interest in the partnership assets. Likewise, it is submitted that the same considerations would apply in the case of an ad valorem tax; that although the assets may have acquired a "business situs" in New York, which apparently they also acquired in the *Blodgett* case, the interest in the partnership would be subject to taxation in Kentucky. See N. Y. CONS. LAWS (Cahill, 1930) c. 40, §§ 52, 65, 68, 69, 73.

1. As to this trust the Court, following previous decisions, held the interests of the appellants taxable.

2. 1 Mass. Gen. Laws (1932) c. 65, § 1.

3. *Id.* § 2.

4. *Id.* § 2.

5. Instant case at 210.

and the tax was assessed on the total. *Held* (Brandeis and Cardozo, JJ., dissenting), that the statute, as applied to the 1862 and 1891 trusts, was in contravention of the Fourteenth Amendment, since it arbitrarily singled out one group to be taxed, those who were donees of powers created before 1907, while exempting others similarly situated. *Binney v. Long,* 57 Sup. Ct. 206 (1936).

Time alone is not a sufficient basis for classification for the purpose of taxation.[6] In the instant case, an inter vivos trust in the nature of the one created in 1862, if it were created after 1907 would not be taxed by the Act of 1907, unless made in contemplation of death.[7] The Act of 1909 then attempted to tax those who received property from a donee of a power created by an instrument antedating 1907, while those who took from a donee of a power created after 1907 were not taxed. Thus two classes were made which were similarly situated in all respects except as to the time when the power was created. Hence the court thought that such a classification, without any apparent justification, was discriminatory.[8] The same result follows as to the trust created in 1891, although in a different respect. There, if the will had become effective after 1907, the heirs would have been taxed as taking from the donor.[9] But since the power was created before 1907 the property was aggregated with that which the donee owned absolutely. Thus time alone was made the basis for the classification again, and the decree of the lower court was modified to the extent that the same tax should be paid as if the power were created after 1907. A possible justification for the attempted method of taxation would be the difficulty the state would have in collecting the taxes, since many executors would be discharged, thus allowing some property to go untaxed. But this reason loses some of its force when one considers that remaindermen become liable for the tax, not at the death of the donor, but when they come into possession and enjoyment, and it is payable by the fiduciary who holds the property, and if none is in office, by the beneficiaries themselves.[10] And surely it could be collected out of the property passing under the power.

Taxation—Income Tax—Preferred Stock Dividend on Common Stock as Income When Issued or Redeemed—In 1922, the petitioner received a 100 per cent. stock dividend paid in preferred stock by a corporation which had formerly had only common stock outstanding. In 1927, the preferred stock was redeemed by the corporation in cash at par. The petitioner claimed immunity from a tax on a cash dividend in 1930, on the ground that either the stock dividend in 1922 or the redemption in 1927 was a taxable dividend which exhausted earnings accumulated since February 28, 1913. *Held,* that the 1930 cash dividend was taxable in part, since the preferred stock dividend on common stock was a non-taxable stock dividend [1] and the subsequent redemption was not "essentially equivalent to a taxable dividend".[2] *August Horrmann,* 34 B. T. A., October 21, 1936.

6. Schlesinger v. Wisconsin, 270 U. S. 230, 239 (1926); Heiner v. Donnan, 285 U. S. 312, 330 (1932).

7. 1 Mass. Gen. Laws (1932) c. 65, § 3.

8. The argument of the state was to the effect that a change in the taxing policy of the state had to take effect at some date. Yet is was admitted that the future policy of the state was not to tax inter vivos transactions of the kind in question.

9. 1 Mass. Gen. Laws (1932) c. 65, § 2.

10. *Id.* § 7.

1. 42 STAT. 228 (1921), 26 U. S. C. A. § 115 (f) (1934).

2. 44 STAT. 11 (1926), 26 U. S. C. A. § 115 (g) (1934). The Board held that the redemption was a distribution in partial liquidation, chargeable in part against capital account

The conclusion that the dividend in preferred shares was not taxable was based largely on *Eisner v. Macomber*,[3] in which the Supreme Court held that a dividend in common stock to common stockholders is not income since it takes nothing from the assets of the corporation and adds nothing to those of the stockholders,[4] being a mere bookkeeping transaction having no effect on the stockholders' proportional interest in the assets.[5] But the Supreme Court has shown a strong tendency to modify its holding that stock dividends are not income. Thus, to fall within the rule, the dividend must be in the stock of the corporation declaring it.[6] Furthermore, where there is more than one class of shares outstanding, a dividend in shares of one class issued to holders of shares of another is taxable income because the recipient shareholders thereby acquire a different proportional interest in the assets of the corporation.[7] However, the Supreme Court has not been faced with the problem of whether a stock dividend is income when the holders of all of the single class of shares outstanding receive shares of another class.[8] In such a case, since there has been no change in the proportional interest in the assets and no reorganization resulting in a formal change in the corporate entity issuing the shares, it would seem more consistent to treat the dividend as non-taxable.[9] On the other hand, in issuing preferred shares, the corporation has undertaken new duties and the shareholders have acquired new rights which might be treated as income [10] if the time of receiving the dividend were felt to be a convenient time to tax the shareholders' gains.[11] However, to treat such a stock dividend as income would be to limit *Eisner v. Macomber* strictly to its facts and to reject its reasoning almost completely. The holding that the redemption of the preferred stock five years after it was issued was not "essentially equivalent to a taxable dividend" [12] is more clearly supported by other decisions.[13] Probably this conclusion was based largely on the long lapse of time between the issuing of the stock dividend and its redemption.[14]

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and in part against post-1913 earnings as provided in 44 STAT. 11 (1926), 26 U. S. C. A. § 115 (c) (1934). Thus the holder of the redeemed shares was taxed not on the total sum realized from the redemption as though he had received a cash dividend, but on the profit actually realized on his shares as would have been the case if he had sold them. For the method of computing gain on share dividends, see Note (1931) 79 U. OF PA. L. REV. 479, 480, n. 2.

3. 252 U. S. 189 (1920), 68 U. OF PA. L. REV. 394.

4. *Id.* at 212.

5. *Id.* at 210.

6. United States v. Phellis, 257 U. S. 156 (1921); Rockefeller v. United States, 257 U. S. 176 (1921); Cullinan v. Walker, 262 U. S. 134 (1923); Marr v. United States, 268 U. S. 536 (1925); *cf.* Weiss v. Stearn, 265 U. S. 242 (1924). For an excellent discussion of these cases on the effect of corporate reorganization, see Magill, *Realization of Income through Corporate Distributions* (1936) 36 COL. L. REV. 519, 542.

7. Koshland v. Helvering, 56 Sup. Ct. 767 (1936) (dividend in voting common stock on non-voting preferred). For opinions on the significance of this decision, see Legis. (1936) 85 U. OF PA. L. REV. 83, 100 *et seq.;* C. C. H. 1936 Fed. Tax Serv. ¶ 5262; U. S. Treas. Reg. 4674, Art. 115-3. Accord: Commissioner v. Tillotson Mfg. Co., 76 F. (2d) 189 (C. C. A. 6th, 1935); H. C. Gowran, 32 B. T. A. 820 (1935).

8. See Legis. (1936) 85 U. OF PA. L. REV. 83, 103.

9. Brown v. Commissioner, 69 F. (2d) 602 (C. C. A. 7th, 1934); Clark v. Commissioner, 77 F. (2d) 89 (C. C. A. 3d, 1935) *semble.*

10. See Magill, *Realization of Income through Corporate Distributions* (1936) 36 COL. L. REV. 519, 538, n. 83.

11. See Note (1932) 45 HARV. L. REV. 1072, 1077 (expressing the view that courts are largely concerned with convenience in choosing the proper time for taxation).

12. 44 STAT. 11 (1926), 26 U. S. C. A. § 115 (g) (1934).

13. Brown v. Commissioner, 69 F. (2d) 602 (C. C. A. 7th, 1934); Commissioner v. Champion, 78 F. (2d) 513 (C. C. A. 6th, 1935).

14. See Note (1936) 49 HARV. L. REV. 1344, 1347.

The mere fact of redemption is not sufficient to establish a taxable dividend;[15] some circumstances must appear to indicate a plan to evade taxation,[16] or at least a lack of bona fide intention to reduce the capital structure.[17] The loose wording of the statute[18] gives the Board of Tax Appeals broad discretion, and since its findings as to what amounts to a taxable dividend are treated as findings of fact,[19] appellate courts will not reverse them when supported by evidence even if a contrary conclusion might reasonably have been reached.[20] Thus, it is doubtful that the Board of Tax Appeals will be reversed in its holding that neither the preferred stock dividend nor the redemption was taxable as income. This seems particularly true since the holding was for purposes of declaring part of a later cash dividend subject to tax. Thus, it is apparent that the Board of Tax Appeals reached a satisfactory solution of the problem of selecting a convenient time to tax the profits of the petitioner in the instant case, without departing from authoritative theories of taxation.

Trusts—Charities—Rights of Creditors in a School Endowment Fund— An incorporated school for boys obtained an endowment fund by means of subscriptions.[1] This fund was kept separate and the income used as stipulated in a resolution[2] adopted by the trustees of the school. Thereafter, the school became bankrupt, and this action was commenced to determine the ownership of the fund. *Held,* that the school held the fund as trustee of a charitable trust, and therefore it was not part of the assets available to creditors of the school. *Crane v. Morristown School Foundations,* 187 Atl. 632 (N. J. 1936).

Whether a charitable corporation becomes the absolute owner of property donated to it, or merely the trustee of a charitable trust, depends on the intention of the donor at the time of making the gift.[3] However, even though the donor has the requisite "trust intent", there is no trust created if the charitable purpose is also one of the corporate purposes, the property being held absolutely.[4] Although the force of at least the first of these rules is not questioned by any court, the results of their application have been in many cases so unwarranted that they can be understood and reconciled only by an appreciation of the strength

15. See Commissioner v. Cordingley, 78 F. (2d) 118, 120 (C. C. A. 1st, 1935).

16. See Commissioner v. Quackenbos, 78 F. (2d) 156, 158 (C. C. A. 2d, 1935).

17. Hill v. Commissioner, 66 F. (2d) 45 (C. C. A. 4th, 1933), 19 IOWA L. REV. 383 (1934).

18. 44 STAT. 11 (1926), 26 U. S. C. A. § 115 (g) (1934). "If a corporation cancels or redeems its stock . . . at such time or in such manner as to make the distribution essentially equivalent to the distribution of a taxable dividend, the amounts so distributed . . . shall be treated as a taxable dividend."

19. See Note (1936) 49 HARV. L. REV. 1344, 1346, n. 16.

20. See Randolph v. Commissioner, 76 F. (2d) 472, 476 (C. C. A. 8th, 1935).

1. The subscription blanks contained the following recital: "To enable the Trustees of the Morristown School Foundation, . . . to establish an Endowment Fund, to increase the salaries of the teaching staff and *for the general purposes of the School,* I agree to give. . . ." (Italics added.)

2. ". . . *the income of which fund* shall be used . . . in the discretion of said Trustees, *for increasing the salaries of Masters and teachers, for providing scholarships to pay the tuition in whole or in part of worthy boys . . . and/or for any general purposes that may be necessary or desirable.*" (Italics are the court's.)

3. Hobbs v. Board of Education, 126 Neb. 416, 253 N. W. 627 (1934); 2 BOGERT, TRUSTS AND TRUSTEES (1935) § 324; RESTATEMENT, TRUSTS (1935) § 351.

4. Lane v. Eaton, 69 Minn. 141, 71 N. W. 1031 (1897); Corporation of Chamber of Com. v. Bennett, 143 Misc. 513, 257 N. Y. Supp. 2 (Sup. Ct. 1932); RESTATEMENT, TRUSTS (1935) p. 1093; ZOLLMAN, AMERICAN LAW OF CHARITIES (1924) § 341. But *cf.* Hobbs v. Board of Education, 126 Neb. 416, 253 N. W. 627 (1934).

of the desire of courts to protect and foster charities.[5] The instant case is an excellent example of this tendency. The wording of the subscription forms does not show an intent to separate the legal and equitable titles,[6] but merely indicates the purposes for which the money should be used.[7] To support their conclusion that there was a "trust intent" the court resorted to the trustees' resolution, adopted prior to the circulation of the subscriptions, and which slightly indicated a plan to create a trust,[8] without in any way showing that the donors knew of the resolution. Furthermore, the court did not take into consideration the very important fact that the money was to be used for the general purposes of the school.[9] And finally, even if a trust were created, there is no apparent reason why the trust res should not have been employed to satisfy the claims of persons to whom the trustee became obligated for services beneficial to the cestuis and in accordance with the purposes of the trust. Thus, while the result reached here may have been benevolent, it is hardly justified in view of the extreme hardship to the creditors.

Unauthorized Practice—Accountant Denied Recovery of Fee for Informing Taxpayer of Right to Tax Refund—Plaintiff, an accountant, solicited defendant company, and in consideration that he would receive fifty per cent of any refunds obtained, informed it that under the New York Retail Sales Tax Law [1] it should not have paid taxes on oil burners sold by it in interstate commerce nor for oil burners sold under a lump sum contract for material and labor, and that installation charges were not taxable. Defendant had the application for refunds prepared by its own legal staff, and obtained the refunds without any help from the accountant, who brought this suit for his agreed fee. *Held,* that the accountant could not recover, since he was practicing law without a license when he interpreted the statute which gave the defendant the right to the refund. *Mandelbaum v. Gilbert & Barker Mfg. Co.,* 290 N. Y. Supp. 462 (N. Y. City Ct. 1936).

While it is well settled that laymen cannot lawfully collect fees for practicing law [2] and that the practice of law by them is punishable by fine or imprisonment,[3] it is not clear, despite the many definitions of the "practice of law" by

5. For example, compare Whitmore v. Church of the Holy Cross, 121 Me. 391, 117 Atl. 469 (1922) with Eccles v. Rhode Island Hospital Trust Co., 90 Conn. 592, 98 Atl. 129 (1916), and note that the differing results benefited the charity in each case. See Stork v. Schmidt, 129 Neb. 311, 261 N. W. 552 (1935); ZOLLMAN, *op. cit. supra* note 4, §§ 569-571.

6. See note 1, *supra*. Even though it might be said that the form of the subscription indicates a direction that the gifts should be held in a separate fund and only the income used, that alone does not indicate an intent to create a trust. *In re* Donchian's Estate, 120 Misc. 535, 199 N. Y. Supp. 107 (Surr. Ct. 1923).

7. The mere statement of the purpose for which a gift is made does not, of itself, make the donee a trustee to accomplish that purpose. 1 BOGERT, *op. cit. supra* note 3, § 46.

8. See *supra* note 2.

9. See *supra* note 1. It should be pointed out, although it does not appear in the opinion, that the Trustees of the Endowment Fund were a different body from the Trustees of the School. This, standing alone, would indicate that the School itself was the beneficiary of a charitable trust, but the additional fact that by the terms of the subscription the gifts were made directly to the School, and not to the Trustees of the Endowment Fund, shows this conclusion to be doubtful at best. There seem to be no cases concerning this point.

1. N. Y. CONS. LAWS (Cahill, Supp. 1935) c. 61, §§ 390 *et seq.*

2. Hughes v. Dougherty, 62 Ill. App. 464 (1895); Crawford v. McConnell, 173 Okla. 520, 49 P. (2d) 551 (1935).

3. People v. Schreiber, 250 Ill. 345, 95 N. E. 189 (1911); *In re* Bailey, 50 Mont. 365, 146 Pac. 1101 (1915); Commonwealth v. Grant, 201 Mass. 458, 87 N. E. 895 (1909); *In re* Morse, 98 Vt. 85, 126 Atl. 550 (1924); see Note (1924) 36 A. L. R. 533.

both legislatures and courts [4] what acts constitute lay practice. In deciding this question, it seems that the courts should be guided by the general principle, admittedly vague, that the lawyer's exclusive province should extend only so far as it is beneficial to the interests of the public to exclude laymen from that particular practice.[5] To sanction the practice in the instant case would encourage the stirring up of litigation and tend to interfere with the collection of taxes. It would also seem that lawyers should be somewhat more competent than accountants to advise clients on questions of tax law,[6] although the plaintiff here was apparently well acquainted with tax law. It has been suggested that there is a narrow neutral zone in which both lawyers and laymen can operate,[7] but it would seem unfair to permit the layman to solicit and advertise even in this zone when the canons of the legal profession do not permit lawyers to do likewise. The instant case, therefore, reflects fairly well the attitude of bar associations in their drive against infringements by laymen upon the lawyer's so-called exclusive domain,[8] although there has been a contrary decision.[9]

4. For a complete collection of cases, statutes, statements of principles, and bibliography on this question, see HICKS AND KATZ, UNAUTHORIZED PRACTICE OF LAW (1934), *passim.*

5. See Note, *The Lawyer's Exclusive Province* (1935) 83 U. OF PA. L. REV. 357.

6. See Hicks and Katz, *The Practice of Law by Laymen and Lay Agencies* (1931) 41 YALE L. J. 69, 95. See 57 A. B. A. REP. 571 (1932).

7. See Ashley, *The Unauthorized Practice of Law* (1930) 16 A. B. A. J. 558.

8. HICKS AND KATZ, *op. cit. supra* note 5, at 3.

9. Elfenbein v. Luckenbach Terminals, 111 N. J. L. 67, 166 Atl. 91 (1933).